Senator Grassley
Questions for the Record

Inga Bernstein,
Nominee, U.S. District Judge for the District of Massachusetts

1. While attending Harvard law School you supported a proposed ban on hate speech.

a. In your view, is hate speech protected under the First Amendment?

Response: Much speech that might be characterized as "hate speech" – for which there is not one single definition – is protected under the First Amendment. The Supreme Court outlined much of the guiding constitutional landscape in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992). If I am fortunate enough to be confirmed, I will apply *R.A.V.* and all other binding precedent of the Supreme Court and First Circuit.

b. Do speech codes violate the First Amendment?

Response: Speech codes can vary substantially so one cannot definitively say that all policies that might be identified as speech codes would violate the First Amendment. Any policy restricting speech would need to be evaluated under the precedents established by the Supreme Court.

c. Do you still support hate speech bans and speech codes on college campuses? If not, please explain why you changed your view.

Response: In 1994, when I was a student at Harvard Law School, I was asked about a draft set of guidelines for sexual harassment, which had been released by a faculty Committee on Sexual Harassment Guidelines and it was reported that I responded as indicated below in Question 1(d). The faculty was working to craft a sexual harassment policy, not a more generalized ban on hate speech. I was not expressing support for hate speech bans and speech codes.

d. You are reported as saying, "The goal of the policy is to balance equality rights with [the] speech rights of everyone." Do you believe that balancing equality rights with an individual's first amendment rights is consistent with First Amendment jurisprudence? Please explain.

Response: The Constitution affords important protections – including protections for freedom of speech and for the equal protection of the laws – that our courts must ensure are respected and protected. If confirmed, I would follow Supreme Court and First Circuit precedent in evaluating claims that any constitutional right has been violated.

2. You've been vocal in your opposition to the application of sex offender registry laws in certain circumstances. In 1997, you represented a sex offender who challenged the constitutionality of the registration requirements of a Massachusetts sex offender act.[1] In the case, your client, Doe, argued that he had heightened liberty interests in privacy and reputation because his past acts would be disclosed subsequent to his registration as a sex offender.

a. In this case, you noted that if your client, a convicted sex offender, had been required to register as a sex offender he would commit suicide. You asked the Court to invalidate the registration requirement on due process grounds. In your view, is there any amount of due process that would have been adequate as a precursor to the registration requirement?

Response: In the 1997 *Doe* case, the Massachusetts Supreme Judicial Court ruled that under the Massachusetts Declaration of Rights the then-newly enacted sex offender registration act, as it was written, violated the procedural due process rights of individuals, like the plaintiff in that case, who were deemed "level one" offenders because it did not require a finding that he posed a threat to children or others that the act seeks to protect before publicly identifying them as sex offenders and disseminating and making available private information about them. Following the issuance of that decision, the statute was revised to provide the opportunity for hearing to assess the risk of threat prior to public disclosure. These changes addressed the procedural due process issues raised in the *Doe* case in which I was involved.

b. The line of reasoning you advanced in *Doe* has been successfully used in other jurisdictions to argue that entire registration schemes should be invalidated. Several of these cases have been successful and have had the impact of removing convicted sex offenders from sex offender registries. Do you believe that this line of cases is an appropriate extension of your legal argument in *Doe*?

Response: I am not familiar with how the arguments advanced in the *Doe* case have been used in other jurisdictions.

c. Additionally, the argument you made in *Doe* has also been employed to argue that sex offender community-notification schemes should be eliminated entirely because they are merely a way to punish African-Americans more severely than any other racial group. Consequently, attorneys have argued that an African-American offender subject to community notification should seek to strike "these laws as contrary to the Equal Protection Clause, presenting evidence of disparate racial impact. Offenders would be highly motivated to make such claims, since legal invalidation could have provided refuge from notification."[2] What do you make of this claim? How would you evaluate this defense?

[1] Doe v. Attorney Gen., 426 Mass. 136, 137-38, 686 N.E.2d 1007, 1009 (1997)
[2] Daniel M. Filler, Silence and the Racial Dimension of Megan's Law, 89 Iowa L. Rev. 1535, 1541 (2004).

Response: I am not familiar with the statutes at issue, which as the article cited notes "vary widely from jurisdiction to jurisdiction." As a judicial nominee, I believe that it would not be appropriate for me to opine on a potential legal theory that might be presented at some point in the future. If confirmed, I would apply governing precedent on equal protection.

d. The Massachusetts Superior Court recently ruled that cities in Massachusetts have no right to pass ordinances restricting where sex offenders can live.[3] The ruling struck down a city ordinance that prohibited level two and three sex offenders from living in certain zones (i.e., close proximity to schools) in the city of Lyle. This ruling has the potential to impact 40 other Massachusetts cities and municipalities that have passed similar ordinances.

i. In light of your experience with sex offender statutes in Massachusetts, how would you evaluate this claim?

Response: The Massachusetts Supreme Judicial Court ruled in the referenced case, *Doe v. City of Lynn*, 472 Mass. 521 (2015), that the local ordinance in question violated the Home Rule Amendment to the Massachusetts Constitution and the Massachusetts Home Rule Procedures Act because it was inconsistent with the comprehensive statutory scheme for the oversight of sex offenders enacted by the Commonwealth. This ruling is now the governing precedent in Massachusetts.

ii. In your opinion what implications will this case have for sex offender statutes in the commonwealth of Massachusetts?

Response: As a judicial nominee, I believe that it would not be appropriate for me to opine on a potential legal theory that might be presented at some point in the future. If confirmed, I would apply governing precedent.

iii. Do you believe that communities or municipalities have the authority to limit zones where sex offenders can live?

Response: As a judicial nominee, I believe that it would not be appropriate for me to opine on a potential legal theory that might be presented at some point in the future. If confirmed, I would apply governing precedent.

1. If so, what zones would be appropriate (i.e., school zones, nursing homes, etc.)?

Response: As a judicial nominee, I believe that it would not be appropriate for me to opine on a potential legal theory that might be presented at some point in the future. If confirmed, I would apply governing precedent.

[3] Doe v. City of Lynn, 472 Mass. 521, 36 N.E.3d 18 (2015).

3. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is the commitment to fairly and impartially apply the law in the cases brought before him or her. I am deeply committed to this principle and, if confirmed, would follow it in every case.

4. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A judge should be diligent, thoughtful, even-handed, and civil. I have always endeavored to treat all people who I come across in my work, and in my life, in this manner, including when acting as an advocate for my client, and would consider it my responsibility to extend this treatment to all with whom I interact if confirmed as a judge.

5. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Please describe your commitment to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: If confirmed, I am fully committed to following the precedents of the Supreme Court and the First Circuit, applying them faithfully and giving them full force and effect.

6. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: If confirmed, in any case of first impression, I would look to the plain language of the statute, regulation, or other text at issue. If the language was clear that would be the end of the inquiry. If the language was ambiguous, I would look to the statute as a whole to determine if the intended meaning was clear from the larger context. I would also utilize established canons of statutory construction as set out by the Supreme Court and the First Circuit. If these efforts did not resolve the question, I would look to Supreme Court and First Circuit decisional law interpreting the same or similar language in other contexts and if that guidance did not clarify the intended meaning, I would look to authority and reasoning from other courts.

7. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: If confirmed, I would at all times apply the decisional law of the Supreme Court and the First Circuit. I would not replace my judgment for any governing decisional law.

8. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Although congressional enactments enjoy the presumption of constitutionality, any enactment that either violates the Constitution or exceeds congressional authority should be declared unconstitutional. Before reaching such a judgment, I would ensure that the case was properly presented for decision and I would assess whether the statute could be validly interpreted without reaching the question of its constitutionality.

9. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution? Please explain.

Response: No. The United States Constitution should be interpreted by looking to the decisional law of the United States Supreme Court and the United States Courts of Appeals.

10. What assurances or evidence can you give this Committee that, if confirmed, your decisions will remain grounded in precedent and the text of the law rather than any underlying political ideology or motivation?

Response: I am deeply committed to the rule of law and understand and appreciate the tremendous importance of applying the text of the law and precedent. Impartial and consistent application of the rule of law is necessary both to the operation of our system of justice and the perception of fairness and confidence that our society places in this system. I commit to comporting myself in conformity with these precepts if confirmed.

11. What assurances or evidence can you give the Committee and future litigants that you will put aside any personal views and be fair to all who appear before you, if confirmed?

Response: Please see my Response to Question 10.

12. If confirmed, how do you intend to manage your caseload?

Response: If confirmed I will utilize the Local Rules of the United States District Court for the District of Massachusetts and case management systems already in place in the District of Massachusetts which include the use of early case management conferences, provisions for automatic discovery and initial disclosures, mechanisms for the sequencing of discovery and setting time limits for all phases of the case. The rules also provide for the exploration of the potential for resolution and the use of alternative dispute resolution. I will also make appropriate use of Magistrate Judges and work to discern and implement other best practices for case management.

13. Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?

Response. Yes, I believe that judges play an important role in the controlling the pace and conduct of litigation. As to specific steps I would take to control the docket, please see my Response to Question 12.

14. You have spent your entire legal career as an advocate for your clients. As a judge, you will have a very different role. Please describe how you will reach a decision in cases that come before you and to what sources of information you will look for guidance. What do you expect to be most difficult part of this transition for you?

Response: If confirmed, I will work diligently to determine and apply the law to the cases that come before me, utilizing Supreme Court and First Circuit precedent, and taking the approaches I set out in my Responses to Questions 5, 6, 7 and 8. In addition, I will fully and fairly consider and evaluate the arguments of all counsel. Although I have worked as an advocate for my clients, in so doing I have always recognized the importance of understanding the best arguments of opposing counsel. I have always valued and respected any judge who works to fairly and impartially fulfil his or her role and those judges who do so are my models. I anticipate that the most difficult part of this transition will be working to quickly establish and implement case management systems, so that I can provide litigants with fair and speedy justice.

15. President Obama said that deciding the "truly difficult" cases requires applying "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy . . . the critical ingredient is supplied by what is in the judge's heart." Do you agree with this statement?

Response: I am not aware of the context in which this comment was made, but I believe that a judge's role is to ascertain and apply the established law in all cases. While doing so, it is my view that work should be approached with respect and civility for all parties.

16. Please describe with particularity the process by which these questions were answered.

Response: I received these questions from the Department of Justice, Office of Legal Policy on April 28, 2016. I drafted my responses and submitted them to the Office of Legal Policy, which I then finalized and approved for submission after some discussion with that office.

17. Do these answers reflect your true and personal views?

Response: Yes.

Questions for Judicial Nominees
Senator Ted Cruz

Responses of Inga S. Bernstein
Nominee, U.S. District Judge for the District of Massachusetts

Judicial Philosophy

1. Describe how you would characterize your judicial philosophy.

Response: My judicial philosophy is that the judge's role is to work diligently and in an unbiased manner to apply the law to the facts of the cases before the court, following and applying binding precedent, the Constitution, legislative enactments, and regulations.

2. How does a responsible judge interpret constitutional provisions, such as due process or equal protection, without imparting his own values to these provisions?

Response: A responsible judge demonstrates fidelity to precedent and commitment to the fair and impartial application of constitutional provisions to cases without consideration of his or her own personal values. If confirmed, I would faithfully apply all binding precedent of the Supreme Court and First Circuit.

3. With the assumption that you will apply all the law announced by the Supreme Court, please name a Warren Court, Burger Court, and Rehnquist Court precedent that you believe was wrongly decided—but would nevertheless faithfully apply as a lower court judge. Why do you believe these precedents were wrongly decided?

Response: If confirmed, my obligation, which I accept without reservation, would be to apply Supreme Court precedent without regard to my personal views as to whether any given case might have been differently decided. As a judicial nominee, I do not think it would be appropriate for me to critique any Supreme Court precedent upon which I might later be required to apply.

4. Which sitting Supreme Court Justice do you most want to emulate?

Response: I respect all the Justices of the Supreme Court, and would wish to emulate their dedication, diligence, and intellectual rigor. My understanding, too, is that despite whatever differences they might have regarding the cases before them, they are collegial and civil in their dealings with one another, which are also traits I want to emulate.

5. Do you believe originalism should be used to interpret the Constitution? If so, how and in what form (i.e., original intent, original public meaning, other)?

Response: In a case involving the Second Amendment, the Supreme Court reiterated that "[i]n interpreting th[e] text, we are guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (and cases cited). If confirmed, I would follow this precedent, as well as

other Supreme Court and First Circuit precedent on appropriate approaches to constitutional interpretation.

6. What role, if any, should the constitutional rulings and doctrines of foreign courts and international tribunals play in the interpretation of our Constitution and laws?

Response: The United States Constitution should be interpreted by looking to the decisional law of the United States Supreme Court and the United States Courts of Appeals.

7. What are your views about the role of federal courts in administering institutions such as prisons, hospitals, and schools?

Response: The Supreme Court provides considerable guidance on the appropriate scope and limitations of any federal court involvement in any such actions. If confirmed, I would follow Supreme Court and First Circuit precedent in this, as in all other, areas.

8. What are your views on the theory of a living Constitution, and is there any conflict between the theory of a living Constitution and the doctrine of judicial restraint?

Response: Article V of the Constitution provides the exclusive means for amending the Constitution. Over the course of our history, our courts have been called upon to apply our Constitution to a wide array of cases. Judicial restraint has long been a component of the analytical approach in deciding when it is necessary to reach and decide constitutional questions. A comprehensive body of law interpreting the Constitution has been developed by the Supreme Court and, if confirmed, I would follow both the language of the Constitution and that precedent, as well as First Circuit precedent, when called upon to assess and rule upon claims or defenses grounded in the Constitution.

9. What is your favorite Supreme Court decision in the past 10 years, and why?

Response: I do not have a favorite Supreme Court decision.

10. Please name a Supreme Court case decided in the past 10 years that you would characterize as an example of judicial activism.

Response: The phrase judicial activism can be used in various ways to impart various meanings, but the following excerpt from an entry in the *Encyclopædia Brittanica* captures my understanding: "Activist judges enforce their own views of constitutional requirements rather than deferring to the views of other government officials or earlier courts." http//www.britannica.com/topic/judicial-activism. Judicial activism of this sort is not appropriate; judges should apply statutes as written and follow binding precedent. As a judicial nominee, I do not believe it would be appropriate for me to identify a Supreme Court case decided in the last 10 years that I would characterize as such judicial activism.

11. What is your definition of natural law, and do you believe there is any room for using natural law in interpreting the Constitution or statutes?

Response: I do not have my own definition of natural law, but according to *Encyclopædia Brittanica*: "Natural law, in philosophy, [is] a system of right or justice held to be common

to all humans and derived from nature rather than from the rules of society." http://www.britannica.com/topic/natural-law. Judges interpreting the Constitution or statutes should rely on precedent from the Supreme Court and courts of appeals, not on natural law.

Congressional Power

12. Explain whether you agree that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S.528, 552 (1985).

Response: *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985), is binding precedent and, as such, if confirmed, I would apply it should I be called upon to do so.

13. Do you believe that Congress' Commerce Clause power, in conjunction with its Necessary and Proper Clause power, extends to non-economic activity?

Response: The Supreme Court has identified "three broad categories of activity that Congress may regulate under its commerce power. . . . the use of channels of interstate commerce[,] . . . the instrumentalities of interstate commerce, or persons and things in interstate commerce, . . . [and] those activities having a substantial relation to interstate commerce[,]" *United States v. Morrison*, 529 U.S. 598, 608-609 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 558-559 (1995)), and has struck down statutes that involved only non-economic activity, *see, e.g.*, *Morrison*, 529 U.S. at 613-618, and *Lopez*, 514 U.S. at 551. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court ruled that the portion of the Comprehensive Drug Abuse Prevention and Control Act that regulates the manufacture and possession of marijuana, as applied to intrastate manufacture and possession, was a valid exercise of power under the Commerce Clause, noting that under the third category, Congress "has the power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17. If confirmed, I will apply this and any other precedent by the Supreme Court and First Circuit involving the Commerce Clause.

14. What limits, if any, does the Constitution place on Congress's ability to condition the receipt and use by states of federal funds?

Response: In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court reviewed its decisional law with respect to the scope of Congressional authority to condition the receipt and use of federal funds by states under the Spending Clause. It reiterated that this authority is subject to "federalism-based limits" and that "conditions placed on federal grants to States must (a) promote the 'general welfare,' (b) 'unambiguously' inform States what is demanded of them, (c) be germane 'to the federal interest in particular national projects or programs,' and (d) not 'induce the States to engage in activities that would themselves be unconstitutional.'" 132 S. Ct. at 2634 (citing *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987)).

15. Is Chief Justice Roberts' decision in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), on the Commerce Clause and Necessary and Proper Clause binding precedent?

Response: There has been some disagreement regarding whether this portion of Chief Justice Roberts' opinion, which four dissenters agreed with, is binding precedent. *See United States v. Henry*, 688 F.3d 637, 641 n.5 (9th Cir. 2012). While some courts of appeals have applied this portion of the opinion as binding precedent, the First Circuit, in *United States v. Roskowski*, 700 F.3d. 50 (1st Cir. 2012), citing the discussion noted in *Henry*, has not yet expressed an opinion as to whether that portion of *NFIB v. Sebelius* "was indeed a holding of the Court." 700 F.3d at 58 n.3. If confirmed and called upon to address this question before this issue is clarified by the Supreme Court of First Circuit, I would follow established precedent for determining the precedential effect of this portion of the opinion.

Presidential Power

16. What are the judicially enforceable limits on the President's ability to issue executive orders or executive actions?

Response: The Supreme Court reviewed the scope of Presidential authority in *Medellìn v. Texas*, 522 U.S. 491 (2008), where it reiterated that: "The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" 522 U.S. at 524 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

17. Does the President possess any unenumerated powers under the Constitution, and why or why not?

Response: Please see my Response to Question 16.

Individual Rights

18. When do you believe a right is "fundamental" for purposes of the substantive due process doctrine?

Response: Fundamental rights are those rights protected by the Due Process Clause of the Constitution. Many of these rights are derived from the Bill of Rights, but the Supreme Court has noted that rights may be deemed fundamental if they are "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

19. When should a classification be subjected to heightened scrutiny under the Equal Protection Clause?

Response: The Supreme Court has held that classifications such as race, alienage, national origin, gender and illegitimacy are subjected to heightened scrutiny under the Equal Protection Clause. *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, 440-41 (1985).

20. Do you "expect that [15] years from now, the use of racial preferences will no longer be necessary" in public higher education? *Grutter v. Bollinger,* 539 U.S. 306, 343 (2003).

Response: I do not have a personal expectation as to when the use of racial preferences will no longer be necessary nor would any such personal opinion have a role in my judicial decision-making, should I be confirmed.

21. To what extent does the Equal Protection Clause tolerate public policies that apportion benefits or assistance on the basis of race?

Response: The Supreme Court has held: "All government racial classifications must be analyzed by a reviewing court under strict scrutiny." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). In *Grutter*, the Court explained: "Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest." The Supreme Court has further stated: "Strict scrutiny is a searching examination, and the government bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.'" *Fisher v. University of Texas at Austin,* 133 S. Ct. 2411, 2413 (2013) (citations omitted).

22. Does the Second Amendment guarantee an individual right to keep and bear arms for self-defense, both in the home and in public?

Response: The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), that "that the District [of Columbia]'s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." The Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), re-affirmed these Second Amendment protections. The First Circuit, in *Hightower v. City of Boston*, 693 F.3d 61 (2012), noted that "Courts have consistently recognized that *Heller* established that the possession of operative firearms for use in defense of the home constitutes the 'core' of the Second Amendment." 693 F.3d at 72 (and cases cited). The First Circuit continued: "Under our analysis of *Heller*, . . . the government may regulate the carrying of concealed weapons outside of the home." 693 F.3d at 73. If confirmed, I will apply Supreme Court and First Circuit precedent if called upon to address these rights.

Written Questions of Senator Jeff Flake
U.S. Senate Committee on the Judiciary
Judicial Nominations
April 20, 2016

Response of Inga S. Bernstein
Nominee, U.S. District Judge for the District of Massachusetts

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1. **What is your approach to statutory interpretation? Under what circumstances, if any, should a judge look to legislative history in construing a statute?**

   Response: If confirmed, my approach to statutory interpretation would be to look to the plain language of the statute, regulation, or other text at issue. If the language is clear that would be the end of the inquiry. If the language was ambiguous, I would look to the statute as a whole to determine if the intended meaning was clear from the larger context. I would also utilize established canons of statutory construction as set out by the Supreme Court and the First Circuit. If these efforts did not resolve the question, I would look to Supreme Court and First Circuit decisional law interpreting the same or similar language in other contexts and if that guidance did not clarify the intended meaning, I would look to authority and reasoning from other courts. Where the text of a statute is ambiguous, the Supreme Court has considered legislative history, and I would follow this and all other precedent if I am fortunate enough to be confirmed.

2. **What is the proper scope of the 10th Amendment to the Constitution? In what circumstances should a judge apply it?**

   Response: The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As the Supreme Court has explained, in reviewing Acts of Congress, the inquiry is "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution[,] . . . [or] whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 154 (1992) (and cases cited). If confirmed, I would look to this and other Supreme Court and First Circuit precedent to address questions of the scope of the Tenth Amendment.

3. **Does current standing doctrine foster or impede the ability of litigants to obtain relief in our legal system?**

   Response: Article III limits judicial power to "Cases" and "Controversies," and, as the Supreme Court has explained, "Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action." *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009). The Court continued to explain that, "This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.' The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that 'the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction.' He bears the burden of showing that he has standing for each type of relief sought." 555 U.S. at 492-93 (internal citations omitted). If confirmed, I will follow Supreme Court and First Circuit precedent on standing.

Senate Committee on the Judiciary
Nominations Hearing – April 20, 2016

Questions for the Record: Senator Amy Klobuchar
Response of Inga S. Bernstein
Nominee, U.S. District Judge for the District of Massachusetts

(1) ***Question for Ms. Bernstein, nominee to be U.S. District Judge for the District of Massachusetts*****:**

You have extensive experience handling civil cases and have worked on criminal matters as well. What is one of your most memorable cases, and if confirmed how will you apply lessons learned from this experience to your time on the bench?

Response: One of my most memorable cases was representing a police officer who was sexually harassed at a union-sponsored event. After some of the involved officers were disciplined, she was targeted for retaliation by her union, who she eventually sued. At trial, my client obtained a verdict that she had been both discriminated and retaliated against. The power of obtaining a jury verdict was, for her, immeasurable.

I recognize that there were other individuals and entities that were also impacted by these events and this litigation. If confirmed, I hope always to recognize that all those who appear before me have their own perspectives, and that the events that bring them to court, and the litigation of their case, may have a profound impact on them. It will be my obligation to treat all respectfully, to preside over the cases they present fairly, impartially and diligently, and to comport myself in such a way as to uphold the integrity and independence of the judiciary.

Questions for the Record
Senate Judiciary Committee
Senator Thom Tillis

Questions for Ms. Inga Saterlie Bernstein

1. **Some individuals have argued that the United States Constitution is a "living document," subject to different interpretations as society changes. Do you subscribe to this point of view?**

   Response: Article V of the Constitution provides the exclusive means for amending the Constitution. Over the course of our history, our courts have been called upon to apply our Constitution to a wide array of cases. A comprehensive body of law interpreting the Constitution has been developed by the Supreme Court and, if confirmed, I would follow both the language of the Constitution and that precedent, as well as First Circuit precedent, when called upon to assess and rule upon claims or defenses grounded in the Constitution.

2. **What role, if any, should societal pressure or popular opinion play in interpreting statutes or the United States Constitution?**

   Response: A judge's obligation is to be true to the rule of law which requires interpreting statutes as written and following and applying binding Constitutional and statutory precedent. Societal pressure and popular opinion cannot override these strictures.

3. **Please define judicial activism. Is judicial activism ever appropriate?**

   Response: The phrase judicial activism can be used in various ways to impart various meanings, but the following excerpt from an entry in the *Encyclopædia Brittanica* captures my understanding: "Activist judges enforce their own views of constitutional requirements rather than deferring to the views of other government officials or earlier courts." http//www.britannica.com/topic/judicial-activism. Judicial activism of this sort is not appropriate; judges should apply statutes as written and follow binding precedent.

4. **When, if ever, is it appropriate for a federal court to rule that a statute is unconstitutional?**

   Response: Although congressional enactments enjoy the presumption of constitutionality, any enactment that either violates the Constitution or exceeds congressional authority should be declared unconstitutional. Before reaching such a judgment, I would ensure that the case was properly

presented for decision and I would assess whether the statute could be validly interpreted without reaching the question of its constitutionality.

5. **What is a fundamental right? From where are these rights derived?**

   Response: Fundamental rights are those rights protected by the Due Process Clause of the Constitution. Many of these rights are derived from the Bill of Rights, but the Supreme Court has noted that rights may be deemed fundamental if they are "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

6. **Do you believe the First Amendment or any other provision of the United States Constitution protects private citizens and businesses from being required to perform services that violate their sincerely held religious beliefs?**

   Response: The First Amendment does provide a certain degree of protection to private citizens and businesses when it comes to engaging in activities that would violate their sincerely held religious beliefs. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), the Supreme Court addressed how to evaluate whether a governmental regulation violates the First Amendment's Free Exercise Clause, noting that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." It also noted that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531. Whether a particular regulatory scheme constituted an impermissible burden on First Amendment rights would need to be evaluated in the context of the facts and circumstances at issue.

7. **What level of scrutiny is constitutionally required when a statute or regulation related to firearms is challenged under the Second Amendment of the United States Constitution?**

   Response: The Supreme Court's decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008), said only that the level of scrutiny was higher than rational basis, but did not specify what the level of scrutiny should be, or even if it would be the same for all potential challenges to regulation under the Second Amendment. Nor has the First Circuit yet answered this question, noting in *Hightower v. City of Boston,* 693 F.3d 61, 74 (1st Cir. 2012):

   > We do not reach the question of what standard of scrutiny applies here. We agree with Judge Wilkinson's cautionary

holding in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011), that we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home, including as to "what sliding scales of scrutiny might apply." *Id.* at 475. As he said, the whole matter is a "vast terra incognita that courts should enter only upon necessity and only then by small degree." *Id.*

8. **On April 23, 2015, the National Employment Lawyers Association, of which you are a member, submitted a letter to the Judiciary Committee supporting the nomination of Judge Restrepo. The letter stated, "It is imperative that the Senate fulfill its constitutional mandate to confirm Judge Restrepo so that individuals have meaningful access to America's public justice system."**

   Do you believe that the Senate has a "constitutional mandate to confirm" an Article III judge under Article II, Section 2 of the United States Constitution?

   Response: Article II, Section 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Article III judges. I would note that I did not sign, draft, or review the National Employment Lawyers Association letter.

9. **As co-chair of Harvard Law School's Coalition for Civil Rights, you supported a ban on hate speech. Specifically, the ban prohibited speech that a "reasonable person" would find "physically intimidating" or that created "a seriously offensive working or educational environment at Harvard Law School."**

   As a non-lawyer, I have always been intrigued as to how certain forms of speech are deemed "hate" while other forms, which might also be objectively distasteful, are simply deemed offensive. If a public university enacts a speech code that prohibits certain types of speech, where is the line drawn regarding what is and is not hate speech, and perhaps more importantly, who gets to decide? Does the majority in Congress or a legislature decide? Does the judge decide on a case-by-case basis? What is the correct analytical framework for determining the legality of so-called hate speech restrictions?

   Response: In 1994, when I was a law student, I was asked about a draft set of guidelines for sexual harassment, which had been released by a faculty Committee on Sexual Harassment Guidelines. It was reported that I said that the goal of the policy was "to balance equality rights with speech rights

of everyone." I was not expressing support for hate speech bans and speech codes.

Much speech that might be characterized as "hate speech" – for which there is not one single definition – is protected under the First Amendment. The Supreme Court outlined much of the guiding constitutional landscape in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382-390 (1992). In *R.A.V.* the Court reiterated that while the "First Amendment generally prevents government from proscribing speech," some, content-neutral speech regulation is permissible, acknowledging the legitimacy of time, place, or manner restrictions, and that certain categories of speech – including obscenity, defamation, and fighting words – are susceptible to regulation. *Id.* at 382-86 (citations omitted). Any policy restricting speech would have to be analyzed under this and all other applicable precedents.

10. **Do you believe it is constitutional for states to require voters to show photo identification before being eligible to cast their vote?**

Response: In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the Supreme Court upheld a state law requiring voters to show photo identification before voting that was challenged on constitutional grounds.

11. **One challenge you will face as a federal judge is managing a demanding caseload. If confirmed, how will you balance competing priorities of judicial efficiency and due process to all litigants involved in the cases on your docket? Will you give certain cases priority over others? If so, please describe the process you will use to make these decisions.**

Response: If confirmed, I will work very hard to develop and immediately implement case management systems and practices to manage cases efficiently and fairly. I will utilize the Local Rules of the United States District Court for the District of Massachusetts and case management systems already in place in the District of Massachusetts which include the use of early case management conferences, automatic discovery and initial disclosures, mechanisms for the sequencing of discovery and setting time limits for all phases of the case. The rules also provide for the exploration of the potential for resolution and the use of alternative dispute resolution. Efficient case management enables the necessary focus to ensure that each case receives the attention it needs from the judge to resolve motions and advance through the court. While at times certain cases may require prompt and immediate attention, such as when preliminary injunctions are sought or Speedy Trial Act rights are implicated, my goal would be to ensure that the entire docket advances appropriately.

12. Do you believe the death penalty is constitutional? Would you have a problem imposing the death penalty?

Response: The Supreme Court reaffirmed that capital punishment is constitutional in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). If confirmed, I would apply settled law in this area, as in all others.

Senator David Vitter
Questions for the Record

Inga S. Bernstein, to be a United States District Judge for the District of Massachusetts

1. **You were involved in the LGBTQ bar association from the "late 90s through 2013" and have litigated a substantial number of discrimination cases over the course of your practice. Earlier this month, a divided panel of the U.S. Court of Appeals for the Fourth concluded that the phrase "sex discrimination" was vague and deferred to a Department of Education letter asserting that public school students should not be required to use the restroom associated with their biological sex, but should be able to use the restroom of the sex that they prefer to identify with.**

   a. **Is the phrase "sex discrimination" vague?**

   Response: The Supreme Court has not yet ruled on the question of whether prohibitions of sex discrimination extend to treatment of transgender/gender non-conforming people, however many courts in wrestling with this issue have looked to the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which found that sex stereotyping is a form of sex discrimination. The First Circuit, in *Rosa v. Park West Bank Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000), held that an individual stated a claim of discrimination on the basis of sex, where the plaintiff was told to "go home and change because [the defendant's employee] thought that [the plaintiff's] attire did not accord with his male gender." If confirmed, I would follow this First Circuit precedent, unless and until it is overruled by the Supreme Court or altered by the First Circuit.

   b. **When is it permissible for a federal court to defer to an agency's position letter over the plain text of a federal statute?**

   Response: While always following and applying binding precedent, if the plain text of a federal statute is clear, a court interpreting and applying it should go no further than that meaning and should not defer to an agency's position over the plain text of the statute.

2. **In 1997, you challenged the constitutionality of the registration requirements under Massachusetts sex-offender law. Do you believe that sex offender registration laws disparately impact homosexual men?**

   Response: Although I have not litigated a sex offender registration case involving a gay man since the 1997 case to which you refer, I am not aware of a disparate impact on gay men under the current Massachusetts sex offender registration statute.

3. **Should churches or religious organizations that advocate for traditional marriage lose their tax exempt status for "political activity" in the wake of the Supreme Court's decision in *Obergefell v. Hodges*?**

Response: I have never researched or litigated the scope and application of rules related to tax exempt status set out in Section 501(c)(3) of the Internal Revenue Code. An evaluation of the facts and circumstances of the activity involved, in light of the IRS code and regulations, would be determinative in any specific situation. I am unaware of any way in which the Supreme Court's decision in *Obergefell v. Hodges* would alter the analysis of what activities would be permitted and what activities would not be permitted under these provisions.

4. **Do you believe that the First Amendment protects the owner of a pharmacy who, based on sincerely held religious beliefs, declines to sell abortifacient drugs in her pharmacy, from being forced by law to do so?**

Response: In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), the Supreme Court addressed how to evaluate whether a governmental regulation violates the First Amendment's Free Exercise Clause, noting that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." It also noted that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531. Whether a particular regulatory scheme constituted an impermissible burden on a pharmacy owner's First Amendment rights would need to be evaluated in the context of the facts and circumstances at issue.